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No. 05-184

In the Supreme Court of the United States

SALIM AHMED HAMDAN, PETITIONER

v.

DONALD H. RUMSFELD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether courts should abstain from interfering with ongoing military commission proceedings.

2. Whether the President has the authority to establish military commissions.

3. Whether the Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, creates judicially enforceable rights.

4. Whether courts may disregard the President's determination as Commander in Chief that al Qaeda combatants are not covered by the Geneva Convention.

5. Whether petitioner has a colorable claim of prisoner-of-war status under the Geneva Convention.

6. Whether the federal regulations governing military commissions must conform to the provisions in the Uniform Code of Military Justice that apply only to courts-martial.

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BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-18a) is reported at 415 F.3d 33. The opinion of the district court (Pet. App. 20a-49a) is reported at 344 F. Supp. 2d 152.

JURISDICTION

The judgment of the court of appeals was entered on July 15, 2005. The petition for a writ of certiorari was filed on August 8, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

[1] The government sought the dismissal of all but Secretary Rumsfeld as respondents in this case. The district court's docket sheet indicates that all of the respondents save the Secretary were terminated on November 23, 2004, after the government filed its notice of appeal, which listed all of the original respondents in the caption.

STATEMENT

1. On September 11, 2001, the United States endured a foreign enemy attack more savage, deadly, and destructive than any sustained by the Nation on any one day in its history. That morning, agents of the al Qaeda terrorist network hijacked and crashed four commercial airliners while targeting the Nation's financial center and its seat of government. The attacks killed approximately 3000 people and caused injury to thousands more, destroyed billions of dollars in property, and exacted a heavy toll on the Nation's infrastructure and economy.

The President took immediate action to defend the country and to prevent additional attacks. Congress swiftly enacted its support of the President's use of "all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001." Authorization for Use of Military Force (AUMF), Pub. L. No. 107-40, § 2(a), 115 Stat. 224.

The President ordered the armed forces of the United States to subdue the al Qaeda terrorist network and the Taliban regime in Afghanistan that supported it. In the course of these armed conflicts, which remain ongoing, the United States, consistent with the Nation's settled practice in times of war, has seized numerous persons and detained them as enemy combatants. And consistent with historical practice, the President ordered the establishment of military commissions to try members of al Qaeda and others involved in international terrorism against the United States for violations of the laws of war and other applicable laws. In doing

so, the President expressly relied on "the authority vested in me * * * as Commander in Chief of the Armed Forces of the United States by the Constitution and the laws of the United States of America, including the [AUMF] * * * and sections 821 and 836 of title 10, United States Code." *Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism*, 66 Fed. Reg. 57,833 (2001) (Military Order).[2]

2. In July 2003, the President, acting pursuant to the Military Order, designated petitioner for trial before a military commission, finding "that there is reason to believe that [petitioner] was a member of al Qaeda or was otherwise involved in terrorism directed against the United States." Pet. App. 1a-2a. Petitioner was charged with a conspiracy to commit attacks on civilians and ci-

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[2] Section 821 of Title 10, United States Code, provides in relevant part:

Art. 21. Jurisdiction of courts-martial not exclusive

> The provisions of this chapter conferring jurisdiction upon courts-martial do not deprive military commissions * * * of concurrent jurisdiction with respect to offenders or offenses that by statute or by the law of war may be tried by military commissions[.]

Section 836 of Title 10, United States Code, provides in relevant part:

Art. 36. President may prescribe rules

> (a) Pretrial, trial, and post-trial procedures, including modes of proof, for cases arising under this chapter triable in courts-martial, military commissions and other military tribunals, * * * may be prescribed by the President by regulations which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which may not be contrary to or inconsistent with this chapter.

vilian objects, murder and destruction of property by an unprivileged belligerent, and terrorism. *Id.* at 62a-67a.

The Charge against petitioner arises out of his close connection to Osama bin Laden and his participation from February 1996 to November 2001 in al Qaeda's campaign of international terrorism against the United States. Pet. App. 65a-67a. The Charge states that petitioner served as bin Laden's bodyguard and personal driver. In that capacity, he delivered weapons and ammunition to al Qaeda members and associates; transported weapons from Taliban warehouses to the head of al Qaeda's security committee at Qandahar, Afghanistan; purchased or otherwise secured trucks for bin Laden's bodyguard detail; and transported bin Laden and other high-ranking al Qaeda operatives in convoys with armed bodyguards. *Ibid.*

The Charge also states that petitioner was aware that bin Laden and his associates had participated in terrorist attacks against U.S. citizens and property, including the September 11 attacks. Pet. App. 65a. Petitioner received terrorist training himself, learning to use machine guns, rifles, and handguns at an al Qaeda training camp in Afghanistan. *Id.* at 67a.

The military commission proceedings at Guantanamo accord petitioner numerous procedural protections. He has the right to legal counsel and is provided with trained counsel. 32 C.F.R. 9.4(c)(2). He has a right to a copy of the Charge in a language he understands, 32 C.F.R. 9.5(a), the presumption of innocence, 32 C.F.R. 9.5(b), and proof beyond a reasonable doubt, 32 C.F.R. 9.5(c). He may confront witnesses against him, 32 C.F.R. 9.5(i), and may subpoena his own witnesses, if reasonably available, 32 C.F.R. 9.5(h). Petitioner will have access to all evidence, except classified and other

national security material (protected information), which nevertheless must be provided to his detailed defense counsel before being admitted against him. 32 C.F.R. 9.5(e), 9.6(d)(5), 9.9.[3] If petitioner is found guilty by the commission, that judgment will be reviewed by a review panel comprised of three military officers (which may include civilians commissioned as such), at least one of whom has experience as a judge,[4] the Secretary of Defense, and ultimately the President, if he does not designate the Secretary as the final decisionmaker. 32 C.F.R. 9.6(h).[5]

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[3] On August 31, 2005, Secretary Rumsfeld approved changes to the military commission procedures, including new language providing that the accused and civilian defense counsel "shall be provided access to Protected Information * * * to the extent consistent with national security, law enforcement interests, and applicable law." See Revised Military Commission Order No. 1 § 6(D)(5)(b) (Aug. 31, 2005) <http://www.defenselink.mil/news/Sep2005/d20050902order.pdf>. The revised procedures further provide that, to the extent such access is denied and "an adequate substitute for that information[] * * * is unavailable, the Prosecution shall not introduce the Protected Information as evidence without the approval of the Chief Prosecutor" and the presiding officer "shall not admit the Protected Information as evidence if" its admission "would result in the denial of a full and fair trial." *Ibid.*

[4] As the district court acknowledged, the review panel is comprised of "some of the most distinguished civilian lawyers in the country," Pet. App. 39a, including Griffin B. Bell, a former federal appeals court judge and Attorney General, and William T. Coleman, a former cabinet secretary, *id.* at 39a n.13.

[5] Prior to the district court's order enjoining the commission proceedings, the Appointing Authority for Military Commissions, see 32 C.F.R. 9.2, granted in part petitioner's motion to remove several of the commission members based on questions regarding their impartiality. Referencing standards applied in federal and international courts, the Authority ordered the removal of three commission members. See http://www.defenselink.mil/news/Oct2004/d20041021panel.pdf.

While at Guantanamo, petitioner has also been given a hearing before a Combatant Status Review Tribunal, which confirmed that he is subject to continued detention as an enemy combatant who is "either a member of or affiliated with Al Qaeda." C.A. App. 249; see *Hamdi* v. *Rumsfeld*, 124 S. Ct. 2633 (2004) (plurality opinion) (concluding that Congress has authorized the detention of enemy combatants by enacting the AUMF); *id.* at 2678-2679 (Thomas, J., dissenting).

3. Petitioner's counsel instituted these proceedings by filing a petition for habeas corpus and/or mandamus in the United States District Court for the Western District of Washington, alleging in relevant part that trial before a military commission rather than a court-martial convened under the Uniform Code of Military Justice (UCMJ), 10 U.S.C. 801 *et seq.*, would be unconstitutional and a violation of the Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316 (the Geneva Convention). See C.A. App. 38-68. While petitioner acknowledged that he worked for bin Laden for many years before his capture, see *id.* at 50-51 (paras. 15-16), he asserted that he was unaware of bin Laden's terrorist activities, *id.* at 52 (para. 19). The district court transferred the case to the United States District Court for the District of Columbia. *Id.* at 195.

4. The district court granted the petition in part, holding that petitioner could not be tried before a military commission. Pet. App. 49a. The court first declined to abstain to allow proceedings to continue before the military commission, which was in the midst of a hearing to consider the very claims that petitioner raises in his federal-court petition, and was a month away from the scheduled trial date. See C.A. App. 250. The court instead held that abstention was "neither required nor

appropriate" because petitioner challenged the jurisdiction of the commission over him. Pet. App. 24a.

Next, the district court ruled that the military commission lacked jurisdiction over petitioner because a "competent tribunal" had yet to determine whether he was entitled to prisoner-of-war (POW) status under the Geneva Convention, a status that the court believed would preclude his trial by military commission. See Pet. App. 29a-31a. In so holding, the district court determined that the Convention grants petitioner rights enforceable in federal court and disregarded the President's determination that al Qaeda combatants are not covered by the Convention. *Id.* at 29a-30a, 36a.

The district court further held that, even if a "competent tribunal" were to determine that petitioner is an unlawful enemy combatant rather than a POW, he could still not be tried by a military commission unless the commission rules are amended to conform with Article 39 of the UCMJ, 10 U.S.C. 839, which governs the presence of the accused at a court-martial. Pet. App. 46a-47a.

Based on these legal rulings, the district court took the extraordinary and unprecedented step of enjoining the ongoing military commission proceedings, and it ordered that petitioner be released to the general detention population at Guantanamo Bay Naval Base. Pet. App. 49a.

After the government filed a notice of appeal, petitioner filed a petition for a writ of certiorari before judgment, which this Court denied on January 18, 2005.

5. The court of appeals reversed. Pet. App. 1a-18a. With respect to the claims that it viewed as going to the power of the military commission to try petitioner, the court declined to abstain. *Id.* at 3a-4a. On the merits,

however, the court of appeals rejected petitioner's claims. Specifically, it held that, through the AUMF and Articles 21 and 36 of the UCMJ, 10 U.S.C. 821, 836, Congress has given the President authority to establish military commissions. Pet. App. 4a-7a.

The court of appeals also rejected petitioner's reliance on the Geneva Convention. Pet. App. 7a-13a. It held that the 1949 Geneva Convention does not create judicially enforceable rights. The court based this conclusion on the principle that treaties, "even those directly benefitting private persons, generally do not create private rights or provide for a private cause of action in domestic courts." *Id.* at 7a-8a (quoting Restatement (Third) of the Foreign Relations Law of the United States § 907 cmt. (a) at 395 (1987)). In particular, it observed that in *Johnson* v. *Eisentrager*, 339 U.S. 763 (1950), this Court held that the 1929 version of the Geneva Convention did not create judicially enforceable rights. The court found *Eisentrager* dispositive with respect to the current version of the Convention, because none of the differences between the 1949 and 1929 Conventions undermined *Eisentrager*'s analysis. Pet. App. 9a-10a.

The court of appeals held in the alternative that, even if the Geneva Convention were judicially enforceable, petitioner could not claim its protection. The court agreed with the President's determination that the Convention does not apply to members of al Qaeda, which, as a non-state terrorist organization, is not one of the "High Contracting Parties" to the Convention. Pet. App. 11a. And petitioner did not qualify as a member of a group that met the Convention's requirements for POW status. *Ibid.* The court found petitioner's reliance on Army Regulation 190-8 to establish POW status

equally unavailing. The court explained that the President had determined that al Qaeda operatives such as petitioner are not prisoners of war and that, to the extent the regulation required a "competent tribunal" to determine his status, the military commission itself could make that determination. Pet. App. 16a.

The court of appeals further held that petitioner was not protected by Common Article 3 of the Geneva Convention, 6 U.S.T. 3318, which applies only to "armed conflict not of an international character." Pet. App. 12a. The court observed that the President has determined that this provision is inapplicable to the conflict with al Qaeda, because the conflict is "international in scope." *Ibid.* The court explained that the President's interpretation of a treaty provision is entitled to "great weight," *ibid.*, and it upheld his "reasonable view of the provision," *id.* at 13a. It went on to explain that, even if Common Article 3 did apply, abstention would be appropriate because his claims under Common Article 3 concern "not *whether* the Commission may try him, but rather *how* the Commission may try him," which is "by no stretch a jurisdictional objection." *Ibid.* Accordingly, even if (contrary to the court's ruling) his claim had merit, it could properly be brought "in federal court after he exhausted his military remedies." *Ibid.*

Finally, the court of appeals rejected the district court's conclusion that Article 36 of the UCMJ, 10 U.S.C. 836, see note 2, *supra*, requires that the rules governing military commissions comply with the UCMJ provisions applicable by their express terms to courts-martial only. The court of appeals observed that, because "the UCMJ takes care to distinguish between 'courts-martial' and 'military commissions,'" the district

court's reading "would obliterate" the distinction the UCMJ draws between them. Pet. App. 14a.

Judge Williams concurred. He took issue only with the court's analysis of Common Article 3, which he believed to be applicable to the conflict with al Qaeda. Pet. App. 18a. Because he agreed with the majority that the Geneva Convention is not enforceable in court and that any claims under Common Article 3 should be deferred until the completion of the military-commission proceedings, Judge Williams "fully agree[d] with the court's judgment." *Id.* at 17a.

ARGUMENT

The decision of the court of appeals is interlocutory. It simply reversed the district court's erroneous decision to enjoin ongoing military commission proceedings a month before the scheduled trial date. Petitioner's trial before a military commission has not yet begun. The military commission may acquit petitioner or may resolve some or all of petitioner's claims in his favor, and some may not even arise (*e.g.*, if classified materials are not presented at trial). In the event petitioner is convicted, an actual trial would create a record that would facilitate any review by this Court. Moreover, the decision of the court of appeals on the merits is correct and does not conflict with any decision of this Court or any other court of appeals. Thus, further review at this time is unwarranted.

1. a. The interlocutory nature of the court of appeals' decision makes plenary review premature, just as it was eight months ago. See 125 S. Ct. 972 (2005). Proceedings before petitioner's military commission had just begun when they were enjoined by the district court. Under the decision of the court of appeals, those

proceedings will now be allowed to continue. Further proceedings before the military commission may make it unnecessary for this Court to address any number of the questions currently presented in the case. If the commission finds petitioner not guilty, the Court can avoid these issues altogether.

Even if petitioner is convicted, many of the issues that petitioner presses now may never arise in his case. For example, petitioner objects to military commission rules providing that a defendant *may* be excused from proceedings at which classified evidence is presented. Although petitioner was excused from a portion of voir dire in which classified information was discussed, it is entirely possible that no classified evidence will be introduced by the prosecution at petitioner's trial. The classified material at issue in the voir dire was related to a recusal issue entirely collateral to the merits of the case against petitioner. It involved evidence concerning the impartiality of the commission, not evidence against the accused. Accordingly, the voir dire proceedings in no way suggest that classified evidence will be introduced against petitioner.[6] Even if such evidence is sought to be introduced, however, the commission's rules, as amended on August 31, 2005, provide for it to be shared with the defendant "to the extent consistent with na-

[6] In light of the August 31, 2005 revisions to the allocation of responsibilities between the presiding officer and the other commission members and to the number of commission members, see Revised Military Commission Order No. 1 §§ 4(A)(2), (5) and (6), the composition of petitioner's commission (other than the presiding officer) is likely to change. Accordingly, petitioner's present complaint about his exclusion from portions of the voir dire (he was not excluded from voir dire of the presiding officer) may well be rendered moot. These changes to the military commission procedures highlight why it would be unwise for this Court to review the case in this interlocutory posture.

tional security, law enforcement interests, and applicable law," and require its exclusion if "admission of such evidence would result in the denial of a full and fair trial." Revised Military Commission Order No. 1 § 6(D)(5)(b). See note 3, *supra*.

Finally, even if the commission does consider such evidence, petitioner's counsel can argue that the evidence should be given minimal or no weight in light of petitioner's inability personally to review and respond to it. 32 C.F.R. 9.6(d)(2). Then, if petitioner is convicted, and the admission of the evidence is deemed erroneous, the error would be subject to harmless-error analysis. This Court has recognized that even "constitutional errors can be harmless," *Arizona* v. *Fulminante*, 499 U.S. 279, 306 (1991), and it has applied that analysis to claims similar to those advanced by petitioner. See, *e.g.*, *Delaware* v. *Van Arsdall*, 475 U.S. 673 (1986) (violation of Confrontation Clause); *Rushen* v. *Spain*, 464 U.S. 114 (1983) (per curiam) (violation of right to be present at every phase of trial). Post-trial application of the harmless-error rule might even make it unnecessary for the Court to determine whether the commission's procedures had in fact resulted in error.

For all of those reasons, review of petitioner's claims at this juncture would be premature. See *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916) (interlocutory status of the case "of itself alone furnishe[s] sufficient ground for the denial" of the petition); see also *Virginia Military Inst.* v. *United States*, 508 U.S. 946 (1993) (opinion of Scalia, J., respecting denial of certiorari). Indeed, this Court routinely denies petitions by criminal defendants challenging interlocutory determinations that may be reviewed at the conclusion of criminal proceedings. See Robert L. Stern et al.,

Supreme Court Practice § 4.18, at 258 n.59 (8th ed. 2002); see, *e.g.*, *Moussaoui* v. *United States*, 125 S. Ct. 1670 (2005). The rationale behind this Court's general practice in criminal cases applies with even greater force to the circumstances presented here, where the legal issues raised by petitioner would require the Court to make possibly unnecessary determinations affecting the exercise of the President's core Commander-in-Chief and foreign affairs authority.

b. Petitioner has not shown that he will be prejudiced by deferring resolution of his claims until after an adverse military-commission judgment, if he is convicted. Petitioner notes that he has been detained for several years at Guantanamo Bay. Pet. 29. But as an individual who has been determined by a Combatant Status Review Tribunal to be "either a member of or affiliated with Al Qaeda," Pet. App. 2a, petitioner is subject to detention as an enemy combatant regardless of the outcome of this litigation or whether he is ultimately convicted of a specific war crime, see *Hamdi* v. *Rumsfeld*, 124 S. Ct. 2633 (2004) (plurality opinion); *id.* at 2678-2679 (Thomas, J., dissenting); *Ex parte Quirin*, 317 U.S. 1, 28 (1942); see also Pet. App. 47a (the district court noting that petitioner "may be detained for the duration of the hostilities in Afghanistan if he has been appropriately determined to be an enemy combatant"). Petitioner was captured in Afghanistan, where military operations are ongoing. See, *e.g.*, Bryan Bender, *U.S. Endures Deadliest Year in Afghanistan*, Boston Globe, July 3, 2005 <http://www.boston.com/news/world/middleeast/articles/2005/07/03/us_endures_deadliest_year_in_afghanistan/>. Tellingly, petitioner's federal action challenged only the commission process and did not advance any legal claims challenging his

detention as an enemy combatant. See C.A. App. 56-64; Pet. App. 47a n.18.

Petitioner objects that he may be prejudiced by having to present a defense before a commission, because reversal of its judgment would result in a retrial. Pet. 28a. But this supposed burden is no different from that faced by any criminal defendant subject to trial before a tribunal that has arguably violated the defendant's rights. It provides no basis for deviating from this Court's ordinary practice of avoiding interlocutory consideration of a defendant's claims in a criminal proceeding.[7]

Petitioner misplaces reliance on *Ex parte Quirin*, 317 U.S. 1 (1942), to justify interlocutory review. The petitioners there, who included a presumed U.S. citizen captured on U.S. soil, faced imminent execution, which is not the case here. Interlocutory review there, which

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[7] As petitioner notes (Pet. 28), the court of appeals concluded that post-trial review of his jurisdictional challenges would be insufficient to protect his "right not to be tried by a tribunal that has no jurisdiction." Pet. App. 4a. That aspect of the court of appeals' decision is anomalous, because there is no general right to interlocutory review of jurisdictional challenges, and a confirmed alien enemy combatant should have no greater right to pre-trial federal review of his challenge to military jurisdiction than an American service-member. See *Schlesinger* v. *Councilman*, 420 U.S. 738 (1975), especially when the challenge is not to military jurisdiction generally, but to the type of military tribunal in which he will be tried. See Pet. 8 ("Petitioner asks simply for a trial that comports with this nation's traditions, * * * such as a court-martial under 10 U.S.C. 818 (authorizing courts martial to try law-of-war violations)."). But even if the court of appeals were correct as to either the appropriateness of abstention or as to *its* jurisdiction over an appeal as of right, that does not inform this Court's discretionary exercise of certiorari review. The interlocutory posture of a case counsels against Supreme Court review even if the error ultimately to be corrected is of a jurisdictional dimension.

took place in the midst of proceedings, provided an alternative to staying an execution. But the Court did not intervene to stop trial proceedings from commencing to prevent the "injury" of undergoing trial by a commission of questionable jurisdiction.[8] Because petitioner faces a maximum sentence of life imprisonment, this Court will have the opportunity to review petitioner's claims at the appropriate time in the event an adverse final judgment is entered against him. See Pet. App. 16a (noting that petitioner's commission "consists of three colonels"); Revised Military Commission Order No. 1 § 6(G) (Aug. 31, 2005) (commission may sentence defendant to death only if comprised of at least seven members in addition to presiding officer).[9] Moreover, this case involves an alien enemy combatant captured abroad, a context in which the jurisdiction of military commissions has long been clear, and in which the Court has been content to resolve jurisdictional questions after a trial before the commission. See *Johnson* v. *Eisentrager*, 339 U.S. 763, 786 (1950).

While petitioner claims (Pet. 30) that the court of appeals' decision implicates "the integrity of our judicial system," there is no reason this Court could not protect the judicial system's integrity by reviewing the case in the ordinary course. That approach not only would avoid the possibility that the Court would unnecessarily

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[8] Specifically, the Court heard the case at the close of the presentation of evidence before the commission. The Court never entered a stay, and closing arguments commenced before the Court issued its decision. See Louis Fisher, *Nazi Saboteurs on Trial* 64-79 (2003).

[9] As mentioned in note 6, *supra*, the composition of petitioner's commission is likely to change, but in all events, like his original commission, the reconstituted commission will contain less than the number of members required to impose a death sentence.

decide questions implicating the most sensitive national security concerns without the benefit of a complete and concrete record, but would also promote the public interest in bringing to justice in an expeditious manner those members of enemy forces who have violated the laws of war. The district court's ill-considered and unprecedented injunction has already resulted in delaying military commission proceedings for nearly a year. A grant of certiorari now would only compound the delay.

c. Finally, petitioner cites the need for guidance in other pending cases as supporting review before a final judgment in his case. But the number of other cases raising claims about the military commissions is small, and those individuals likewise can raise their claims in the commissions in the first instance and post-conviction in the event they are found guilty. Moreover, to the extent other detainees not currently subject to trial by a military commission have an interest in some of the issues decided by the court of appeals here, they have the opportunity to litigate those issues in the specific contexts implicated by their detention and can seek clarity and guidance from the court of appeals in their own cases (up to and including guidance from the en banc court, a step petitioner here bypassed).

2. Petitioner contends that the decision of the court of appeals creates a variety of conflicts with decisions of other courts of appeals. None of those asserted conflicts withstands scrutiny.

a. Petitioner suggests that, when the court of appeals interpreted the AUMF to authorize military commissions, it created a conflict with decisions of the Court of Military Appeals. Pet. 13. The cases cited considered only the interpretation of Article 2(10) of the UCMJ, which "[i]n time of war" subjects to court-martial juris-

diction "persons serving with or accompanying an armed force in the field." 10 U.S.C. 802(10). See *Zamora* v. *Woodson*, 42 C.M.R. 5, 6 (C.M.A. 1970); *United States* v. *Averette*, 41 C.M.R. 363, 363 (C.M.A. 1970). In each case, which involved the court-martial *of a civilian*, the Court of Military Appeals construed the language "in time of war" to refer to a declared war. Those holdings in no way conflict with the decision of the court of appeals here.

First, Congress has authorized the President to establish procedures for military commissions, 10 U.S.C. 836(a), and it has explained that court-martial jurisdiction does not "deprive military commissions * * * of concurrent jurisdiction," 10 U.S.C. 821. Neither of those provisions uses the language "in time of war" to limit the availability of commissions, which have been employed in conflicts without regard to whether they followed formal declarations of war. See, *e.g.*, Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 Harv. L. Rev. 2047, 2129 (2005) (observing that military commissions "have been used in connection with formally declared wars as well as other military conflicts, such as the Civil War and conflicts with Indian tribes"). Further, the court of appeals in this case properly determined that the AUMF, which directed the President to use "all necessary and appropriate force" against al Qaeda, had authorized him to establish military commissions. See Pet. App. 5a-7a.

Second, it is well settled that the UCMJ applies generally to armed conflicts, including the Vietnam conflict at issue in *Zamora* and *Averette*, in which the United States has engaged without a formal declaration of war. See, *e.g.*, *United States* v. *Anderson*, 38 C.M.R. 386, 387 (C.M.A. 1968) ("The current military involvement of the

United States in Vietnam undoubtedly constitutes a 'time of war' in that area, within the meaning of Article 43."); *United States* v. *Bancroft*, 11 C.M.R. 3, 5-6 (C.M.A. 1953) (finding that conflict in Korea is "time of war" under the UCMJ). The decisions cited by petitioner are inapposite, because they apply only to civilians subjected to a court-martial, see *United States* v. *Reyes*, 48 C.M.R. 832, 835 (A.C.M.R. 1974) (en banc); *Averette*, 41 C.M.R. at 365-366; *Zamora*, 42 C.M.R. at 6, unlike petitioner, a confirmed enemy combatant charged before a military commission with violating the laws of war applicable to combatants.

b. Petitioner next asserts that there is a circuit conflict with respect to "the basic question of whether those facing trials at Guantanamo can assert *any* constitutional protection." Pet. 16. The court of appeals did not resolve that issue, and the decision below therefore neither creates nor implicates any split of authority on that issue.[10] Pet. App. 4a-5a. Instead, the court assumed that petitioner could raise constitutional claims; it simply rejected petitioner's separation-of-powers argument on the merits. *Id.* at 5a-7a. That decision implicates no conflict among the circuits and rests on a straightforward application of the AUMF, the statutes referring to military commissions, and this Court's decisions interpreting them. *Ibid.* (discussing *Quirin*, 317 U.S. at 28-29; *In re Yamashita*, 327 U.S. 1, 11, 19-20 (1946); and

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[10] The issue of whether the detainees held as enemy combatants at the Guantanamo Bay Naval Base can assert rights under the United States Constitution is more squarely presented in appeals (*Al Odah* v. *United States*, Nos. 05-5064, 05-5095 through 05-5116 (D.C. Cir.), and *Boumediene* v. *Bush*, Nos. 05-5062 & 05-5063 (D.C. Cir.)) set for argument before the D.C. Circuit on September 8, 2005.

Hamdi v. *Rumsfeld*, 124 S. Ct. 2633, 2640-2642 (2004) (plurality opinion)).[11]

c. Petitioner further contends that the court of appeals created a conflict with other circuits when it held that he could not seek court enforcement of the Geneva Convention. Pet. 20-25. Petitioner does not argue that *any* other court of appeals has held the Convention to be judicially enforceable, for *none* has. Instead, he claims that he is entitled to enforce the Convention through the habeas statute, 28 U.S.C. 2241. That argument overlooks that the habeas statute is merely a grant of jurisdiction, see, *e.g.*, *Bowrin* v. *INS*, 194 F.3d 483, 489 (4th Cir. 1999); it does not create any substantive rights, see, *e.g.*, *Jimenez* v. *Aristeguieta*, 311 F.2d 547, 557 n.6 (5th

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[11] In any event, there is no bona fide conflict in regard to whether aliens outside the United States have due process rights under the Federal Constitution. Indeed, this Court has been "emphatic" in rejecting "the claim that aliens are entitled to Fifth Amendment rights outside the sovereign territory of the United States." *United States* v. *Verdugo-Urquidez*, 494 U.S. 259, 269 (1990); see *Eisentrager*, 339 U.S. at 781-785; *Zadvydas* v. *Davis*, 533 U.S. 678 (2001). The Circuit rulings cited by petitioner are not to the contrary. See *Cuban Am. Bar Ass'n* v. *Christopher*, 43 F.3d 1412, 1425 (11th Cir.) (holding that Cubans detained at the Guantanamo Bay Naval Base have no constitutional right to due process or speech), cert. denied, 515 U.S. 1142 (1995). In *Reid* v. *Socialist People's Libyan Arab Jamahiriya*, 162 F.3d 748 (2d Cir. 1998), cert. denied, 527 U.S. 1003 (1999) (see Pet. 16 n.11), the court of appeals did not address the constitutional due process rights of aliens abroad. The other cited circuit cases serve petitioner no better: *Haitian Ctrs. Council, Inc.* v. *McNary*, 969 F.2d 1326 (2d Cir. 1992), was vacated by this Court, *Sale* v. *Haitian Ctrs. Council, Inc.*, 509 U.S. 918 (1993), and has no precedential value. *Government of the Canal Zone* v. *Scott*, 502 F.2d 566 (5th Cir. 1974), discussed constitutional rights in the former Panama Canal Zone. At the time, the Canal Zone was deemed an unincorporated sovereign territory of the United States. See *id.* at 568.

Cir. 1962), and its reference to treaties does not make treaties that provide for enforcement only at the State-to-State level judicially enforceable any more than does 28 U.S.C. 1331's reference to "treaties." The authorities petitioner cites do not support his argument. In *Ogbudimka* v. *Ashcroft*, 342 F.3d 207, 218 n.22 (2003), the Third Circuit expressly declined to consider an argument similar to that advanced by petitioner, while in *Wang* v. *Ashcroft*, 320 F.3d 130, 140-141 & n.16 (2003), the Second Circuit allowed a habeas petitioner to seek enforcement of rights created by a *statute*, not by a treaty, see *id.* at 140 (noting Wang's argument that the Foreign Affairs Reform and Restructuring Act "creates individual rights based on" the Convention Against Torture).

d. Finally, petitioner suggests that there is a "split in authority about Common Article 3" of the Geneva Convention. Pet. 27. Even if there were such a split, this case would be a poor vehicle for considering that issue. The court of appeals expressly held, in the alternative, that the Geneva Convention is not judicially enforceable and that petitioner's Common Article 3 claims are subject to abstention. Accordingly, there are two independent legal obstacles—neither of which implicates a split of authority—to reaching the Common Article 3 question. In any event, no split of authority exists. The case cited by petitioner, *Kadic* v. *Karadzic*, 70 F.3d 232, 243 (2d Cir. 1995), held that Common Article 3 (6 U.S.T. 3318) "binds parties to internal conflicts" even if they are not states. It did not consider the applicability of Common Article 3 to a conflict, such as that between the United States and al Qaeda, that is not internal to a state. As the court of appeals explained in this case, Pet. App. 12a-13a, such a conflict may reasonably be de-

scribed as being "of an international character" and therefore outside the scope of Common Article 3, as the President determined.[12]

3. a. Given the interlocutory nature of the petition, the government will not engage in a point-by-point rebuttal of petitioner's lengthy arguments on the merits for reversal of the court of appeals' holding. As an initial matter, however, there is a substantial likelihood that this Court would not even reach the merits of petitioner's arguments, because, if the Court were to review the case now, it first would have to consider the threshold question of abstention to allow the pending military commission proceedings to move forward.

In the past, this Court has recognized the need for judicial abstention in the face of proceedings before a military tribunal. As the Court has explained, the need for protection against judicial interference with the "primary business of armies and navies to fight or be ready to fight wars" "counsels strongly against the exercise of equity power" to intervene in an ongoing court-martial. *Schlesinger* v. *Councilman*, 420 U.S. 738, 757 (1975). The Court has held that even a case with relatively limited potential for interference with military action—*i.e.*, the prosecution of a serviceman for possession and sale of marijuana—implicated "unique military exigencies." *Ibid.* These exigencies normally preclude a court from entertaining "habeas petitions by military

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[12] *Kadic* was not a habeas case, but looked to Common Article 3 in evaluating the viability of the plaintiffs' claims under the Alien Tort Statute (ATS). This Court's decision in *Sosa* v. *Alvarez-Machain*, 124 S. Ct. 2739, 2763, 2767 (2004), superseded the Second Circuit's approach to the ATS, making clear that the ATS does not render judicially enforceable those treaties that themselves do not create judicially enforceable rights.

prisoners unless all available military remedies have been exhausted." *Id.* at 758. Accord *Gusik* v. *Schilder*, 340 U.S. 128, 133 (1950); *Noyd* v. *Bond*, 395 U.S. 683, 696 (1969).

The concern for interference with military exigencies is only heightened where, as here, the military proceedings involve enforcement of the laws of war against an enemy force targeting civilians for mass death. See *Yamashita*, 327 U.S. at 11 ("trial and punishment of enemy combatants" for war crimes is "part of the conduct of war operating as a preventive measure against such violations"); *Hirota* v. *MacArthur*, 338 U.S. 197, 208 (1949) (Douglas, J., concurring) ("punishment of war criminals * * * dilut[es] * * * enemy power and involv[es] retribution for wrongs done").

The court of appeals relied on *Quirin* in declining to abstain with respect to petitioner's jurisdictional claims. That reliance was misplaced, because no party argued for abstention in *Quirin*, and the case is distinguishable in a number of other key respects. As explained above, pp. 14-15, the petitioners in *Quirin* included a presumed U.S. citizen captured in the United States and facing imminent execution, unlike Hamdan, an alien enemy combatant captured abroad whose commission cannot sentence him to death. The urgency that attended *Quirin* thus does not exist here. Moreover, the legal landscape has changed considerably since 1942. The *Quirin* decision itself, recently reaffirmed in *Hamdi*, 124 S. Ct. at 2643 (plurality opinion); *id.* at 2682 (Thomas, J., dissenting), and *Yamashita* and *Eisentrager* (both of which were decided post-military trial) make clear that military commissions in a variety of circumstances may try enemy combatants for offenses against the laws of war. Permitting petitioner's military

commission to go forward under the authority of these decisions hardly constitutes the type of exigency ~~crisis~~ that justifies halting a military proceeding conducted during an ongoing armed conflict.

In short, the court of appeals erred in declining to abstain. That decision does not implicate a split in circuit court authority or otherwise independently merit the Court's review. Indeed, all of the reasons that this Court has held abstention to be appropriate in similar circumstances counsel, *a fortiori*, against interlocutory review of this petition. Considerations of separation of powers, deference to military proceedings, avoiding abstract questions and unnecessary decisions all favor deferring judicial review, including review by this Court, until after the commission proceedings run their course. Moreover, the prospect that review at this time would lead to nothing more than the reaffirmation of *Councilman* also militates against interlocutory review.

b. Moreover, petitioner has not shown that the court of appeals' decision is inconsistent with the Constitution, the UCMJ, or international law, much less that it is so glaringly inconsistent that it warrants this Court's review notwithstanding both the petition's interlocutory nature and the absence of any circuit conflict.

i. Petitioner suggests that his trial by military commission would be inconsistent with *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866). *Milligan* has no application to this case. *Milligan* involved the military trial of a U.S. citizen who was detained within the United States and was not "part of or associated with the armed forces of the enemy," *Quirin*, 317 U.S. at 45. As an alien captured overseas and confirmed to be an enemy combatant, petitioner cannot liken his predicament to Milligan's. See *Hamdi*, 124 S. Ct. at 2642 (plurality opinion). In any

event, as petitioner acknowledges, Pet. 11, to whatever extent *Milligan* might have limited the use of military commissions, it was superseded by *Quirin*. And as the plurality in *Hamdi* recognized, *Quirin* establishes that "the capture, detention, *and trial* of unlawful combatants, by 'universal agreement and practice,' are 'important incident[s] of war.'" 124 S. Ct. at 2640 (quoting *Quirin*, 317 U.S. at 28) (emphasis added). Because *Quirin* "both postdates and clarifies *Milligan*," it provides "the most apposite precedent" here. *Id.* at 2643.

ii. Petitioner contends that his trial by military commission would be inconsistent with the UCMJ. Pet. 16-20. This is not a claim of the right not to be tried, but rather simply a challenge as to how petitioner will be tried. That is a matter to be reviewed, if at all, at the end of the commission proceedings. In any event, the argument is without merit. As the court of appeals explained, the UCMJ expressly preserves military-commission jurisdiction, and the UCMJ provisions regulating courts-martial cannot be read to impose the same procedural requirements on military commissions. Congress has never sought to regulate military commissions comprehensively; rather, it has recognized and approved the President's historic use of military commissions as he deems necessary to prosecute offenders against the laws of war. Pet App. 14a-15a (citing *Madsen* v. *Kinsella*, 343 U.S. 341, 346-348 (1952)). If military commissions were required to follow the same procedures as courts-martial, there would be no point in having a military commission, whose jurisdiction the UCMJ recognizes precisely because of the historic authority and flexibility the President has had to administer justice to enemy fighters who commit offenses against the laws of war.

iii. Petitioner invokes two additional statutes that were not addressed by the court of appeals: 10 U.S.C. 3037(c)(3), which directs the Judge Advocate General of the Army to "receive, revise, and have recorded the proceedings of courts of inquiry and military commissions"; and 18 U.S.C. 242, a criminal statute that prohibits various forms of discriminatory conduct against aliens. Pet. 17. Because these statutory claims were never adequately raised before the court of appeals and never addressed by that court, they have not been preserved and are not properly presented to this Court. See *United States* v. *Ortiz*, 422 U.S. 891, 898 (1975) (declining to consider issue "raised for the first time in the petition for certiorari").[13]

iv. Petitioner contends that his trial by military commission would violate international law. Pet. 13-16. To the extent he relies upon the Geneva Convention, his claim is fully addressed by the thorough opinion of the court of appeals, which explained that the Convention does not create judicially enforceable rights. Pet. App.

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[13] Moreover, these new statutory arguments lack merit. Even assuming that 10 U.S.C. 3037(c) creates privately enforceable rights, petitioner's claim is meritless. That provision, which merely identifies a duty of the Judge Advocate General, has been interpreted in its predecessor form as setting out a clerical function; the provision does not authorize the Judge Advocate General to engage in substantive review of military commission proceedings. See *Ex parte Mason*, 256 F. 384, 387 (C.C.N.D.N.Y. 1882). As for 18 U.S.C. 242, that provision does not apply to petitioner, because he is not a "person in any State, Territory, Commonwealth, Possession, or District" within the meaning of the statute. 18 U.S.C. 242. Moreover, petitioner cites no authority for the proposition that this criminal statute is privately enforceable, let alone that it has any application in the context of war, in which enemy aliens have always been subjected to different treatment from citizens. See generally *Eisentrager*.

7a-10a. There is no circuit conflict on this issue warranting this Court's review, and the court of appeals' ruling is fully consistent with this Court's construction of the prior version of the treaty in *Eisentrager*. Petitioner has identified nothing in the current Convention's text or drafting and ratification history to suggest the revolutionary intent to create judicially enforceable rights. To the contrary, the enforcement provisions of the 1949 Convention, like its predecessor, make clear that disagreements and alleged violations are to be addressed via State-to-State negotiations and neutral-party oversight, not by domestic courts. Compare art. 11, 6 U.S.T. 3326 and art. 132, 6 U.S.T. 3420 (1949 Convention), with art. 31, 47 Stat. 2041 and art. 87, 47 Stat. 2061 (Geneva Convention Relative to the Treatment of Prisoners of War, July 27, 1929, 47 Stat. 2021, 118 L.N.T.S. 343).

In any event, even if the issue of the enforceability of the Convention in court by a person captured as part of an armed conflict were deemed to present an issue warranting this Court's review, this case would not provide an appropriate vehicle for addressing the issue. As the court of appeals held, petitioner would not qualify for POW protection under the Convention in any event. Petitioner now claims that he could obtain POW status under Articles 4A(1) and (4), 6 U.S.T. 3320.[11] Pet. 27. But those claims were not raised in the court of appeals, see Pet. App. 11a, and are contradictory. Article 4A(1)

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[11] Petitioner asserts that, because he claims POW status under Articles 4A(1) and (4), he need not satisfy the criteria set out in Article 4A(2). Pet. 27. That assertion lacks merit because the term "armed forces" in Articles 4A(1) and (4) is properly read as limited to armed forces that comply with the criteria set out in Article 4A(2). See *Commentary to the Geneva Convention Relative to the Treatment of Prisoners of War* 62-63 (Red Cross 1952).

grants POW status to "members of the armed forces of a Party to the conflict as well as members of militias or volunteer corps forming part of such armed forces," whereas Article 4A(4) grants such status to persons who are *not* members of the armed forces, but who accompany them. Moreover, petitioner's assertion of Article 4A(1) status conflicts with his assertion in his habeas petition that he is an innocent civilian. See C.A. App. 51-52. And petitioner's assertion of Article 4A(4) status conflicts with the finding by the Combatant Status Review Tribunal that petitioner is a combatant. In any event, petitioner may raise his claim that he is an innocent civilian (which is a refutation of the Charge) as a defense in his trial before the military commission. Thus, that fact-bound issue is not properly presented to this Court.

Finally, petitioner asserts rights under Article 3 of the Convention, but in doing so he disregards the phrase that limits the Article's application to conflicts "not of an international character." Pet. App. 12a (quoting Common Article 3). The President has determined that this provision is inapplicable to the conflict with al Qaeda because the conflict is "international in scope." *Ibid.* As the court of appeals observed, even if Common Article 3 did apply, it would not affect whether petitioner could be tried by a military commission, but only what procedures the commission would have to use. *Id.* at 13a. For this reason, any claim under that article should be brought, if at all, after trial, if petitioner is convicted.

v. Petitioner further contends that the laws of war do not apply to his case because the conflict between the United States and al Qaeda is not a war between two states. Pet. 13-16. That contention lacks merit. As an

initial matter, whether there exists a state of armed conflict against an enemy to which the laws of war apply is a political question for the President, not the courts. See *The Prize Cases*, 67 U.S. (2 Black) 635, 670 (1862) ("Whether the President in fulfilling his duties, as Commander-in-Chief, in suppressing an insurrection, has met with such armed hostile resistance, and a civil war of such alarming proportions as will compel him to accord to them the character of belligerents, is a question to be decided *by him*, and this Court must be governed by the decisions and acts of the political department of the Government to which this power was entrusted.") (emphasis in original). In any event, the suggestion that the laws of war do not apply to conflicts against non-state entities is flatly incorrect. It is well established that the laws of war fully apply to armed conflicts involving groups or entities other than traditional nation-states: "it is not necessary to constitute war, that both parties should be acknowledged as independent nations or sovereign states." *Id.* at 666; see also Ingrid Detter, *The Law of War* 134 (2d ed. 2000) ("non-recognition of groups, fronts or entities has not affected their status as belligerents nor the ensuing status of their soldiers as combatants").

The President recognized that al Qaeda's repeated attacks against the United States created a state of armed conflict, see Military Order § 1(a), as did Congress when it supported the President's exercise of his Commander-in-Chief authority against the "nations, *organizations, or persons* he determines" were responsible for the September 11 attacks. AUMF, 115 Stat. 224 (emphasis added). Moreover, NATO, upon concluding that al Qaeda was responsible for directing those attacks from abroad, took the unprecedented step of

invoking Article 5 of the North Atlantic Treaty, which provides that an "armed attack against one or more of [the parties] shall be considered an attack against them all." North Atlantic Treaty, Apr. 4, 1949, art. 5, 63 Stat. 2244, 34 U.N.T.S. 246; see Statement of NATO Secy. Gen. (Oct. 2, 2001) <http://www.nato.int/docu/speech/2001/s011002a.htm>. All of those actions eliminate any possible doubt concerning the applicability of the laws of war to the conflict with al Qaeda, and nothing in the Geneva Convention indicates that a state of armed conflict cannot exist when a State is attacked by an entity that is not entitled to the Convention's protections.[15]

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[15] Petitioner's related contention that the charge against him is not "prosecutable by a commission" (Pet. 14) is equally meritless. Conspiracy to commit offenses against the laws of war—the offense with which petitioner is charged—has been prosecuted before military commissions throughout this Nation's history. See *Quirin*, 317 U.S. at 23; *Colepaugh* v. *Looney*, 235 F.2d 429, 432 (10th Cir. 1956) (upholding military-commission trial of Nazi saboteur charged with conspiracy), cert. denied, 352 U.S. 1014 (1957); Charles Howland, *Digest of Opinions of the Judge Advocate General of the Army* 1071 (1912) (identifying conspiracy "to violate the laws of war by destroying life or property in aid of the enemy" as an offense against the laws of war that was "punished by military commissions" during the Civil War).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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